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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 262

PEERLESS STAGES, INC.,
Appellant,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, and THE GREYHOUND CORPORATION,
Appellees.

Appeal from the United States District Court for the Northern District of California

Motion of Appellee, The Greyhound Corporation, to Affirm Judgment

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Motion of Appellee, The Greyhound Corporation, to Affirm Judgment

Appellee and defendant The Greyhound Corporation ("Greyhound") moves the Court pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States to affirm the judgment below on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

Brief in Support of Motion to Affirm Judgment

QUESTION PRESENTED

Did the Interstate Commerce Commission exceed its jurisdiction in refusing to grant appellant a certificate of public convenience and necessity to operate as a common carrier by motor vehicle of passengers upon the ground that no showing had been made that the existing carriers are unwilling and unable to meet the public's reasonable transportation needs within their authorized territories.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in appellant's Jurisdictional Statement ("Jur. St."), Appendix C.

STATEMENT OF THE CASE

This is a direct appeal from a final judgment entered on May 3, 1962 by a three-judge District Court, specially constituted pursuant to 28 U.S.C. §§ 2284 and 2325, sustaining an order of the Interstate Commerce Commission ("Commission") and dismissing appellant's complaint.

Appellant is a common carrier of passengers by motor vehicle, operating for many years under a certificate of public convenience and necessity issued by the Commission between Oakland, San Jose and Santa Cruz and intermediate points in California. During the year 1958, appellant began large-scale operations from San Francisco, Oakland, San Jose and other points in Northern California to gambling casinos located in Nevada, principally the Wagon Wheel Casino in Stateline, Nevada. Appellant held no certificate authorizing such operations.

The Commission investigated appellant's operations to Nevada and in November, 1958, filed an action in the United States District Court for the Northern District of California to enjoin these operations. The court denied the injunction on the ground that the matters involved could be more effectively determined by the Commission itself. An investigation of appellant's operations was subsequently instituted by the Commission on its own motion. This investigation culminated in a cease and desist order by the Commission against appellant's operations to Nevada. The cease and desist order was upheld by the three-judge District Court and appellant does not challenge the validity of this order before this Court.

In December, 1958, shortly after the Commission started proceedings against appellant, appellant filed an application with the Commission for a certificate to operate as a common carrier between points in California and points in Arizona, Nevada, New Mexico and Utah. At the hearing thereon, the application was amended so as to limit it to operations between the San Francisco Bay Area and the Reno-Lake Tahoe Area in Nevada (Tr. 303, 396-397).

The Commission's examiner recommended denial of the application on December 16, 1959. Exceptions were filed and on May 11, 1961, Division 1 of the Commission denied the application (Jur. St., Appendix A). Appellant's appeal to a three-judge District Court was dismissed on May 3, 1962 (Jur. St., Appendix B).

The only issue which appellant seeks to bring before this Court is the correctness of "the standards applied by the Interstate Commerce Commission * * * in denying the application of the appellant * * *" (Jur. St. pp. 2, 13).

ARGUMENT

This appeal raises only a single issue, to wit, whether the Commission exceeded its jurisdiction in denying appellant a common carrier certificate upon the ground that the existing carriers were adequately serving the public.

Appellant's application was filed under Section 207(a) of the Interstate Commerce Act ("the Act"). (49 U.S.C. § 307(a)) which provides as follows:

> "Subject to section 210, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, *if it is found* that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and *that the proposed service*, to the extent to be authorized by the certificate, *is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied: Provided, however*, That no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations over other than a regular route or routes, and between fixed termini, except as such carriers may be authorized to engage in special or charter operations." (Emphasis supplied.)

The Commission's task in passing on applications for certificates of public convenience and necessity is now settled beyond controversy. In *United States v. Detroit & Cleveland Navigation Co.*, 326 U.S. 236 (1945), this Court defined the Commission's role as follows:

> "The Commission is the guardian of the public interest in determining whether certificates of convenience and necessity shall be granted. For the performance of that function the Commission has been entrusted with a wide range of discretionary authority. * * * Its func-

> tion is not only to appraise the facts and to draw inferences from them but also to bring to bear upon the problem an expert judgment and to determine from its analysis of the total situation on which side of the controversy the public interest lies. Its doubt that the public interest will be adequately served if resumption of service is left to existing carriers is entitled to the same respect as its expert judgment on other complicated transportation problems." (p. 241; citations omitted.)

And in *United States v. Pierce Auto Lines, Inc.*, 327 U.S. 515 (1946), this Court said:

> "We think the court misconceived not only the effects of the Commission's action in these cases but also its own function. It is not true, as the opinion stated, that '* * * the courts must in a litigated case, be the arbiters of the paramount public interest.' This is rather the business of the Commission, made such by the very terms of the statute. The function of the reviewing court is much more restricted. It is limited to ascertaining whether there is warrant in the law and the facts for what the Commission has done. Unless in some specific respect there has been prejudicial departure from requirements of the law or abuse of the Commission's discretion, the reviewing court is without authority to intervene. It cannot substitute its own view concerning what should be done, whether with reference to competitive considerations or others, for the Commission's judgment upon matters committed to its determination, if that has support in the record and the applicable law." (pp. 535-536)

Appellant does not question the sufficiency of the evidence to support the Commission's exercise of judgment in this case, and this should conclude the matter.

In an effort to avoid the impact of the Act and of the uniform line of decisions under it, appellant here seeks to

attack the "standard" applied by the Commission in denying the certificate. Appellant contends that because it had been operating without authority and as the Commission has found, in violation of the Act, it is entitled to the benefits of a special standard, different from that which is applied to other applicants who await a ruling on their application before commencing operations.

The issue raised by appellant is one which the Commission considered (see Jur. St., Appendix A, p. A16) and on it—just as on other matters bearing on public convenience and necessity—the Commission's exercise of judgment is final and binding and not subject to review.

The instant appeal is nothing but a veiled effort to have this Court second-guess the Commission's findings of facts and its exercise of discretion thereon. The motion to affirm should be granted on the foregoing authorities.

Even if there were an issue before this Court respecting the correctness of the standard applied by the Commission, the position taken by appellant is totally lacking in merit.

The standard by which the Commission is guided in ruling upon an application for a common carrier certificate is necessarily controlled by the governing statute. In this case, the statutory standard under Section 207(a) leaves the Commission no alternative but to deny an application for a service which it does not find to be *required* by public convenience *and necessity*.

The standard incorporated in Section 207(a) derives from Part I of the Act (Section 1(18)) which has been in effect since 1920. Section 207(a) was itself enacted in 1935 as a part of the Motor Carrier Act (Part II of the Act). Not only has there been no legislative change in the standard governing the issuance of common carrier certificates throughout the many years during which the Act has been in effect, but the manner in which the Commission has ap-

plied it has remained unchanged throughout numerous reenactments, amendments and revisions of the Act. In an unbroken line of decisions since the enactment of the Motor Carrier Act in 1935, the Commission has denied applications for common carrier certificates upon the grounds herein set forth, i.e. that the existing carriers have not been shown to be unwilling or unable to meet the public's reasonable transportation needs within their authorized territories.* The application of this standard has not only been consistently approved by the courts, *Chesapeake Motor Lines, Inc. v. United States*, 176 F. Supp. 98 (D. Md. 1959), *Filson v. I.C.C.*, 182 F. Supp. 675 (D. Colo. 1960), but the granting of a certificate without an express finding of inadequacy of the existing service has been held to be reversible error by this Court: *Hudson Transit Lines, Inc. v. United States*, 82 F. Supp. 152 (S.D. N.Y. 1948), motion to affirm judgment granted, 338 U.S. 802 (1949); *Inland Motor Freight v. United States*, 60 F. Supp. 520 (E.D. Wash. 1945).

To compel the Commission to depart from this standard —as appellant asks here—would require a profound change

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*See, particularly, *Arco Auto Carriers, Inc., Extension*, 72 M.C.C. 453, 457 (1957) and *Trueman Extension*, 74 M.C.C. 765, 768 (1958); and also, *Bluenose Bus Co. Ltd., Common Carrier Application*, 1 M.C.C. 173, 176 (1936); *Richards, Extension of Operations*, 6 M.C.C. 80, 81 (1938); *Ohio Transportation Co., Common Carrier Application*, 29 M.C.C. 513, 520 (1941); *Royal Cadillac Service, Inc., Common Carrier Application*, 43 M.C.C. 247, 259 (1944); *Brewer, Extension*, 48 M.C.C. 667, 669 (1948); *Black, Extension of Operations*, 48 M.C.C. 695, 711 (1948); *McCullough Transfer Co., Extension*, 49 M.C.C. 121, 125 (1949); *Lehigh Transp. Co., Inc., Extension*, 51 M.C.C. 653, 658 (1950); *W. J. Halloran Trucking Co., Extension*, 52 M.C.C. 749, 751 (1951); *Gilliland, Extension*, 53 M.C.C. 597, 602 (1951); *Pine Tree Transport, Inc., Extension*, 54 M.C.C. 669, 674 (1952); *M&M Fast Freight, Inc., Extension*, 68 M.C.C. 513, 521 (1956); *Thomas Goodfellow, Inc., Common Carrier Application*, 68 M.C.C. 672, 674 (1956); *M&M Oil & Transp., Inc., Extension*, 69 M.C.C. 39, 41 (1956); *Wheelock Bros., Inc., Extension*, 69 M.C.C. 599, 602 (1957); *Bort, Common Carrier Application*, 72 M.C.C. 650, 652 (1957); *Schirmer Transp. Co., Inc., Extension*, 76 M.C.C. 293, 301 (1958); *William F. Crossett, Inc., Extension*, 76 M.C.C. 661, 665 (1958); *Smith, Extension*, 77 M.C.C. 113, 116 (1958).

of regulatory policy, amendment of the Act and rejection of forty years of administration by the Commission.

Appellant's reliance on *Interstate Commerce Commission v. J-T Transport Co.*, 368 U.S. 81 (1961), demonstrates its lack of understanding of the issues involved here as well as the lack of merit of its position. That case involved the correctness of the standard applied by the Commission in denying a *contract carrier permit under Section 209(b)* of the Act which in relevant part provides as follows:

> "In determining whether issuance of a permit will be consistent with the public interest and the national transportation policy declared in this Act, the Commission shall consider the number of shippers to be served by the applicant, the nature of the service proposed, the effect which granting the permit would have upon the services of the protesting carriers and the effect which denying the permit would have upon the applicant and/or its shipper and the changing character of that shipper's requirements."

Prior to the decision in *J-T Transport Co.*, Section 209(b) had been amended by adding the above-quoted five factors which Congress wanted the Commission to consider in determining whether a permit should issue. The Commission had also proposed to Congress a sixth factor—"that existing carriers are unwilling or unable to provide the type of service for which a need has been shown"—but, upon encountering vigorous objections, withdrew its proposal.

In remanding that case to the Commission, this Court held that by adding the five criteria, Congress directed the Commission to consider not merely the position of protesting carriers but all of the implications raised by the matters referred to in Section 209(b). As this Court put it:

> "• • • as we read the Act, as amended in 1957, the standard is not whether existing services are 'reason-

> ably adequate. It is whether a shipper has a 'distinct need' for a different or a more select or a more specialized service. The protesting carriers must show they can fill that 'distinct need,' not that they can provide a 'reasonably adequate service.'" (pp. 90-91)

The decision in the *J-T Transport Co.* case is significant in demonstrating the difference between the standards applicable under Sections 209(b) and 207(a), respectively. Section 207(a)—and Section 1(18) from which it was derived—has consistently been applied so as to authorize the granting of an additional certificate only if the existing carriers' service has been shown to be inadequate.

Appellant has introduced many irrelevancies into its Jurisdictional Statement such as claims of discrimination and rebating which are not material to the issues before this Court. These claims are not supported by the record, neither are appellant's intemperate and unwarranted attacks on the Commission for its choice of words, for alleged "favoritism" and for allegedly seeking

> "to insure * * * approval of Greyhound's continuing to act as shill for Harrah's Club." (Jur. St. p. 17)

The significant fact about appellant's position, however, is that it does not challenge the sufficiency of the Commission's findings nor of the evidence to support them. Appellant's purported references to the record appear to be intended merely to bring about a departure from the established standard which controls certificate applications (although there is little similarity between appellant's characterization of the record and the record facts). Even if such a departure were permissible under Section 207(a) (which it is not), it would not be justified on this record. Appellant's entire case is pitched on the alleged need of the Wagon Wheel Casino for its own certificated motor carrier in its

competition with Harrah's Club. This seems like a matter far removed from the ambit of the Commission's responsibility under the Act. In any case, the house of cards which appellant tries to construct for purposes of this appeal must fall before the uncontroverted record facts that

(1) The management of the Wagon Wheel knew of no rate concessions by Greyhound to competing casinos and was not aware that Greyhound's tariff in fact makes the same rates available to all casinos at any geographical location (Tr. 338-339, 422, 423);

(2) Greyhound has never refused to place advertising for the Wagon Wheel in its terminals or to make arrangements with the Wagon Wheel comparable to those with other casinos. (Tr. 341, 422-423). Appellant's argument concerning the Wagon Wheel's need for separate terminal facilities is nullified by the record fact that appellant uses Greyhound's terminals (having none of its own) (Tr. 415);

(3) The Wagon Wheel has made no requests whatever for service from Greyhound since February, 1957, because it was able to get service from other carriers for less (Tr. 328-330, 340-341); and

(4) The Wagon Wheel discontinued its bus operations a few months before the hearing because enough passengers from Greyhound's operation to Harrah's Club patronized the Wagon Wheel (Tr. 325-336).

Appellant's emotional appeal reaches its peak when it characterizes the Commission's action as "insur[ing] Greyhound's virtual monopoly of the transportation business * * *" (Jur. St. p. 17). It is always easy and frequently convenient to attack a regulated common carrier as a monopoly, but it is surprising to have the attack come from one such as appellant who, itself a certificated common

carrier over other routes, has surely experienced the competitive inroads of other forms of passenger transportation, particularly the private automobile.* The attack, moreover, comes with ill grace from appellant who, significantly, does not intend to assume the responsibility of operating regular route operations but seeks authority merely to skim the cream by limiting its service to the lucrative high-density casino operations.

CONCLUSION

There is nothing unusual about this case. It is a run-of-the-mill application proceeding, similar in content and manner of disposition to thousands of others handled by the Commission each year. The only thing that may set this case apart is the indefatigable ingenuity of appellant. Nothing in the merits of the case, however, justifies its presence before this Court. For the reasons stated, the judgment of the court below should be affirmed.

Respectfully submitted,

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Dated at San Francisco, California, August 15, 1962.

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*A substantial amount of competition also comes from carriers certificated over other routes, who, under the provisions of Section 208(c) of the Act, thereby hold incidental authority to perform charter operations to points throughout the United States. Appellant has such incidental authority and is authorized to conduct legitimate charter operations to the Wagon Wheel Casino and elsewhere without limitation.